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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MICO CHONG LIANG CHUNG,

Plaintiff and Respondent,

v.

LOUISE YI LIU,

Defendant and Appellant.

B285402

(Los Angeles County
Super. Ct. No. BC541482)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daniel S. Murphy, Judge. Reversed and remanded with directions.

Law Offices of J. Steven Kennedy and J. Steven Kennedy
for Defendant and Appellant.

Kermisch & Paletz, Mary Lu, and Lauren M. Lookofsky for
Plaintiff and Respondent.

This action involves in-laws litigating over \$10.8 million that a deceased man and his wife allegedly stole from the man's mother and brother. Louise Yi Liu (Liu), the widow of the deceased man, lost below. She appeals a \$4 million judgment against her for money had and received in favor of Mico Chong Liang Chung (Mico) as the personal representative of the Estate of Wang Say Ching Chung (Wang's Estate).¹ In addition, Liu appeals the posttrial order denying her motion for judgment notwithstanding the verdict (JNOV). We conclude that JNOV should have been granted and reverse the judgment on that basis. On remand, judgment shall be entered for Liu.

FACTS

Background

Jason Chong Ming Chung (Jason) was the son of Wang Say Ching Chung (Wang) and brother of Mico. In 2002, Jason formed Chung & Company, LLC (Chung & Company). The operating agreement provided that Wang was the sole member and would contribute \$3.2 million to Chung & Company's capital. Jason was identified as the company's manager. Wang granted Jason limited power of attorney to act on behalf of Chung & Company. In the early 2000's, Jason married Liu. He passed away in March 2012. Wang passed away in April 2014.

Santa Ana Buildings

Chung & Company purchased two buildings in Santa Ana, California (Santa Ana Buildings). It used cash on hand² as well

¹ To avoid confusion, we refer to family members with the last name "Chung" by their first names.

² Mico testified that the cash on hand came from the sale of a Santa Monica apartment building. He further testified that his

as a \$6 million loan from Shanghai Commercial Bank. A few years later, Jason borrowed \$1.5 million and \$2.5 million and used the Santa Ana Buildings as collateral. Eventually, the amount of the Shanghai Commercial Bank loan grew to \$6.8 million. Wang wired \$6.8 million to Jason to pay off the loan. Jason signed a document stating that the loan had been paid off. He also stated, “I will give priority to paying back the money that I borrowed from my mother.” Jason sold one of the Santa Ana Buildings in 2010 and the other one in 2011. He did not repay Wang the \$6.8 million.

North Atlantic Building

Mico decided he wanted to purchase a building (North Atlantic Building) and told Jason. Jason told Mico to “come up” with \$4 million. Mico had “some money” and also “money that [Wang] put in [his] account for safekeeping, [so he] arrange[d]” a \$4 million transfer into a joint bank account that he held with Jason at Bank of America. The plan was for Jason to purchase the North Atlantic Building and put it in the name of Chung & Company.³ Instead, Jason formed a separate company called First California Equity to purchase the North Atlantic Building.

In 2007, First California Equity mortgaged the property for \$1.2 million. Subsequently, First California Equity sold the property.

parents purchased that building in 1980, and that Jason managed it.

³ Mico testified that Jason represented that they and their siblings were board members of Chung & Company. Per Mico, he and Jason agreed that the North Atlantic Building would be “a family property.”

Jason's Salary

As reported in his taxes, Jason earned \$60,000 a year from Chung & Company.

Money Received or Possessed by Liu; Her Lifestyle

Liu testified that before she gave up her real estate license in 2008, she sometimes made over \$100,000 a year through commissions, finder fees or referral fees, and that she saved for retirement. In 2009, per Liu, she had about \$300,000 in retirement savings. There were various deposits into her bank accounts, and various transfers between accounts. For example, in 2009, there was a \$51,000 deposit. She testified that it was a transfer from her "C.D. account." Via checks, she received \$20,000 from Chung & Company. In August 2011, Chung & Company wired \$100,000 to Liu. She testified that Jason gave her this money to cover personal as well as business expenses while living in China. The following month, Jason wrote her a check for \$60,000 from his personal account. At trial, Liu was asked about \$1.2 million going into one of her bank accounts between August 2009 and September 2011.⁴

Jason and Liu purchased a home in Pasadena, California in 2004 for \$1.55 million with a downpayment of \$500,000. When Jason passed away, Liu still lived in that property. The house was in foreclosure. She testified that she used her saving and retirement money to bring the mortgage current. At the time of trial, Liu was paying \$4,000 on a first mortgage and \$1,800 on a second mortgage. Her son was attending private school, which

⁴ This case involves voluminous evidence of money received by Jason and Liu. Because most of the money received by Liu was not sourced, and because there is no claim it amounted to \$4 million, we do not detail it.

cost \$15,000 a year. She had a rental condo for which she received \$2,500 in monthly rent. The mortgage on the condo was about \$1,200 a month. After property tax and association fees, her cash flow from the condo was \$500.

This Lawsuit

Mico, on behalf of himself as well as Wang's Estate, sued Liu as an individual and as the personal representative of Jason's estate (Jason's Estate). The matter went to trial on causes of action for intentional misrepresentation, concealment and money had and received.⁵ The trial court granted a nonsuit as to the claim against Jason's Estate because it was not sued within a year of Jason's death as required by Code of Civil Procedure section 366.2.

In closing argument, counsel for Wang's Estate argued that the case was simple. "It's one man, one son, one brother who deceived his mother and brother into providing him with over \$10 million to invest in claimed income-producing assets only to take that money and never had it returned, and all the while his spouse helped him deceive his family." Counsel pointed out that Jason "only received nominal income while managing [the Santa Ana Buildings] and [North Atlantic Building] of \$5,000 a month. However, . . . Jason had control over the Chung [&] Company bank accounts, and he . . . [¶] . . . withdrew tens of thousands of dollars per month from the business accounts writing checks upwards of \$20,000 at a time to himself." In addition, Liu "received funds from Chung [&] Company as well[.]" The evidence

⁵ According to the Wang's Estate brief, Mico sought return of the \$4 million he advanced to Jason, and the Wang's Estate sought return of the \$6.8 million Wang wired to Jason to pay off the Shanghai Commercial Bank loan.

showed that Jason wrote checks to himself and Liu, and that Liu received transfers from Chung & Company “for well over a hundred thousand dollars in the span of a few months.”

Continuing on, counsel averred: Jason borrowed \$1.5 million and \$2.5 million against the Santa Ana Buildings, “and the monies were never accounted for.” Wang mortgaged assets to pay off the Shanghai Commercial Bank loan, and she expected to be paid back.

According to counsel, Liu benefited from Jason’s fraud. She still maintained her expensive lifestyle after Jason died. Though Liu claimed she knew nothing about what Jason did, and that she had her own savings, it made no sense that she could live off her savings for seven or eight years when she had to pay for a mortgage as well as private school and attorney fees in this case and probate.

As for money had and received, counsel argued that Jason’s and Liu’s “lives were funded by” the money that they took from Wang and Mico through fraud. Regarding damages, counsel argued: “[M]y position would be that [Mico] was owed \$4 million from his investment in [the North Atlantic Building].” Counsel noted that the jury “heard about these two amounts, \$4 million and \$6.8 million,” and then stated, “So you can give zero up to \$10.8 million and anything in between. It’s not all or nothing, basically.”

The jury was provided with a special verdict form agreed to by both parties. The jury found in Liu’s favor with respect to intentional misrepresentation and concealment. As for money had and received, the jury found: (1) Liu received money intended to be used for the benefit of Mico and/or Wang; (2) that money was not used for the benefit of Mico and/or Wang; and

(3) Liu did not give that money to Mico and/or Wang. In the monetary damages section of the special verdict, the jury awarded no damages to Mico. To Wang's Estate, the jury awarded \$4 million.

Liu moved for JNOV on the grounds that any money had and received was intended for Chung & Company rather than Wang and could not support a judgment. In her reply papers, Liu argued that "[j]ust because Jason . . . might have received the money or executed a promissory note does not mean that [Liu] received or did the same. . . . The only money she was proven at trial to have received was from Chung & Company . . . and no evidence was provided that this money came directly from" Wang. The motion was denied.

This appeal followed.

DISCUSSION

I. Denial of JNOV is Reviewable.

Wang's Estate argues that denial of JNOV is not reviewable because Liu's notice of appeal only pertains to the judgment. We cannot concur. JNOV was denied on September 8, 2017. The notice of appeal was filed on September 28, 2017, and indicated that Liu was appealing from the judgment as well as "an order or judgment under Code of Civil Procedure, § 904.1(a)(3)-(13)." Under Code of Civil Procedure section 904.1, subdivision (a)(4), a party can appeal the denial of a motion for JNOV. Thus, the notice of appeal was sufficient to trigger review of the JNOV ruling.

II. Liu was Entitled to JNOV.

When reviewing the denial of a JNOV, we will affirm if there is substantial evidence supporting the jury's verdict. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228,

1237.) On the other hand, if we conclude JNOV should have been granted, we must enter judgment for the moving party. (Code Civ. Proc., § 629, subd. (c).)

Under the substantial evidence test, we ask whether the findings are supported by “evidence that is reasonable, credible and of solid value. [Citation.]” (*Minnegren v. Nozar* (2016) 4 Cal.App.5th 500, 507.) “Speculation or conjecture alone is not substantial evidence. [Citation.]” (*Ibid.*) When applying the substantial evidence test, we adhere to the following: “All conflicts in the evidence are resolved in favor of the prevailing party, and all reasonable inferences are drawn in a manner that upholds the verdict. [Citations.]” (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.)

“When a special verdict is involved . . . , a reviewing court does not imply findings in favor of the prevailing party. [Citations.]” (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678.)

“The essential elements of an action for money . . . had and received are: (1) a statement of indebtedness of a certain sum, (2) the consideration made by the plaintiff, and (3) nonpayment of the debt. [Citation.]” (*First Interstate Bank v. State of California* (1987) 197 Cal.App.3d 627, 635.)

Here, a fact necessary to support the money had and received award was a finding that Liu received a specific sum of money that was intended for Wang’s use.⁶ (*Avidor v. Sutter’s*

⁶ Wang’s Estate argues that money had and received could be alternatively proven if Liu and Jason jointly participated in the receipt of Wang’s money whether or not Liu actually received it (*Sarten v. Pomatto* (1961) 192 Cal.App.2d 288, 296), or if Jason applied Wang’s money for Liu’s benefit with her consent whether

Place, Inc. (2013) 212 Cal.App.4th 1439, 1454; *First Interstate Bank v. State of California*, *supra*, 197 Cal.App.3d at p. 635 [“no recovery for money had and received can be had against a defendant who never received any part of the money”]; *Pollak v. Staunton* (1930) 210 Cal. 656, 665 (*Pollak*) [an action for money had and received is designed to prevent unjust enrichment, and the “measure of the liability is the amount received”].)

In the respondent’s brief, Wang’s Estate states that this case is about the \$6.8 million that Wang lent to Jason. We take this as a concession that it is not seeking to recover any Chung & Company money.

Simply put, it is speculative to say that Liu personally received \$4 million of the \$6.8 million that Jason indicated he would pay back to Wang. At trial, Wang’s Estate did not account for where that \$6.8 million went. Moreover, even if Liu had an expensive lifestyle, it is conceivable she had the benefit of the money from the sale of the North Atlantic Building as well as the money Jason borrowed against it. Thus, it is impossible to say that Liu’s lifestyle is explained only by her having at least \$4 million of the \$6.8 million.

Wang’s Estate argues that “even if there is a dispute as to whether [Liu] actually received \$4,000,000, it is not necessary to prove that she did in fact receive these funds[.] . . . A]s in an action for damages, the jury is not limited to the amount of money actually received by [a] defendant.” It cites *Zikratch v. Stillwell* (1961) 196 Cal.App.2d 535 (*Zikratch*).

or not she received it. (*Ibid.*) Because the special verdict form did not ask the jury to make findings on these issues, they are not relevant to our discussion.

In *Zikratch*, the defendant was a real estate broker who breached his fiduciary duty by making a secret profit. He got the plaintiff to agree to sell land at \$1,500 an acre while negotiating to sell to a third party for \$3,500 an acre. Defendant and his associates arranged to buy the property for themselves for \$1,500 an acre and resell it for \$3,500 an acre. The jury returned a verdict for \$21,442.84, and defendant appealed. He argued that his liability should have been limited to the amount he received, thereby suggesting that he should not be liable for what his associates may have received. The court stated that the rule in *Pollak*—that money had and received recovery is limited to the amount actually received—“clearly applies only where the relief sought is on the implied contract to restore money unjustly retained. But this was not the basis of the trial of the action here at bar.” (*Zikratch, supra*, 196 Cal.App.2d at p. 542.) The court explained that damages “connote the character of relief afforded to an injured party for the injury suffered, that is, the amount which will compensate the injury party for all detriment which was proximately caused by the unlawful act of defendant. [Citations.] [¶] Thus, in the matter here at bar, what defendant unjustly received is not the criteria, but rather, the criteria is what amount which will reasonably compensate plaintiffs for the injury they suffered.” (*Id.* at p. 543.) The court noted that the pretrial order stated that the action was for damages, and it further noted that in “cases of fraud by a fiduciary, the broad rule of Civil Code sections 1709 and 3333 is commonly applied. [Citation.]” (*Ibid.*)⁷

⁷ Civil Code section 1709 provides: “One who willfully deceives another with intent to induce him to alter his position to his injury or risk[] is liable for any damage which he thereby

Zikratch does not apply to this case. The defendant there breached a fiduciary duty and was liable for tort damages, i.e., was liable for the amount of injury suffered by plaintiff rather than the amount of money the defendant actually received. Here, the jury did not find Liu liable for a tort. Insofar as it found Liu liable for money had and received, that could only be in assumpsit and therefore based on an implied contract to repay the money received. (*Firpo v. Pacific Mut. Life Ins. Co.* (1926) 80 Cal.App. 122, 124–125; *Richardson v. Roberts* (1962) 210 Cal.App.2d 603, 608 [the gist of an implied contract claim is that the defendant is obligated “by the ties of natural justice and equity to refund the money”].)

The problem for Wang’s Estate is that it tried a fraud case but not an assumpsit case and the jury did not find for it on the fraud claims. It tries to avoid this problem by advertng to *Evans v. Faught* (1965) 231 Cal.App.2d 698, 713, which held that when a case is tried without objection on the theory that a certain rule for the measure of damages is correct, “the defendant cannot urge for the first time on appeal that the case was tried on an erroneous theory as to damages.”

We find this rule inapplicable.

There are two versions of money had and received. The first is for recovering a debt and amounts to waiving tort remedies and suing in assumpsit. (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14–15 (*Zumbrun*).)

suffers.” Civil Code section 3333 establishes, “For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”

With respect to this version of the common count, the terms “causation” and “damages” are not used to describe it. (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 937.) The second version is an alternative method of recovering a money judgment based on other theories of liability. (*Peiser v. Mettler* (1958) 50 Cal.2d 594, 605–606 [“Although our case law permits the use of common counts, nevertheless the courts recognize that where the common counts follow a count wherein all of the facts on which plaintiff’s demand is based are specifically pleaded and the common counts upon their face make it clear that they are based upon the same set of facts, the common counts are to be considered not as different causes of action, but as alternative methods of pleading the plaintiff’s right to recover the money judgment he seeks”].) This version allows for damages under Civil Code section 3281⁸ insofar as it is premised on a defendant’s wrongful act or omission.

Based on the foregoing, it was not incorrect for Wang’s Estate to seek damages and otherwise refrain from proving a basis for recovery under assumpsit. Wang’s Estate was entitled to focus on this type of money had and received. Accordingly, there was no basis for Liu to object to the theory of damages at trial. Also, Liu is not now arguing that the measure of damages urged at trial was erroneous. Rather, both in her JNOV motion and on appeal, Liu is simply arguing there was insufficient evidence to support the judgment.

⁸ Civil Code section 3281 provides: “Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.”

Wang's Estate quotes the rule that "the theory upon which a case was tried in the court below must be followed on appeal. [Citations.]" (*Gibson Properties Co. v. Oakland* (1938) 12 Cal.2d 291, 299 (*Gibson*)). Tacitly, it suggests that this rule prohibits Liu from arguing that an award based on an assumpsit version of money had and received was not supported by sufficient evidence. But *Gibson* says no such thing. The irony is that *Gibson*, in fact, works against Wang's Estate. Having essentially tried a damages case instead of an assumpsit case, and having essentially pursued money had and received as an alternative method for recovering fraud damages, Wang's Estate cannot now suggest that its money had and received claim was actually the assumpsit version. In any event, as we have explained, an assumpsit version of the common count was not supported by evidence that Liu actually received \$4 million of the \$6.8 million intended for Wang's use.

All other issues are moot.

DISPOSITION

The order denying JNOV is reversed. The judgment is reversed. Upon remand, the trial court is instructed to enter judgment for Liu.

Lui is entitled to her costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT